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No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation),
Appellant,

vs.

MURIEL E. COLTHURST,
Appellee.

BRIEF FOR APPELLEE.

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FOREWORD.

This cause was tried upon an agreed statement of facts as set forth in the transcript of the record (pages 18 to 25 inclusive) and again in appellant's brief (pages 4 to 9 inclusive). Appellee will not further encumber the record by again setting forth said facts; those items which are necessary to our argument will be referred to therein.

CONTENTIONS.

The appellee contends:

1. That under the policy and the California Statute (Stats. 1919, page 776) here involved, the injured person, when forced to sue the insurer, to realize on

his judgment against the negligent insured, does not stand in a like position to the insured, bringing a suit on the policy against his insurer and hence a defense that the insured failed to perform a condition subsequent cannot be asserted by the insurer against the injured person.

2. That in view of the undisputed facts in this matter an affirmation of the judgment is dictated by the merits.

ARGUMENT.

I.

WE CONTEND THAT THIS STATUTE DEPRIVES THE INSURANCE COMPANY OF THE DEFENSE IT IS ATTEMPTING TO SET UP; NOT ONLY IN EXPRESS TERMS BUT ALSO BY VIRTUE OF THE INTENT THAT IS BEHIND IT.

The practical benefit of this statute would be nil if the insured could cancel or rescind the policy on the ground that a condition subsequent had not been performed and thereby leave the injured person without any recourse. This cannot be done under the statute for it would permit the insured and the insurer to do the very thing the statute strikes at.

Justice Smith in *Roth v. National Casualty Company*, 195 N. Y. S. 865, in speaking of the similar New York Statute expresses what we consider to be the purpose of the California Statute:

> "I do not think that the failure of the insured to co-operate after the accident, not induced by plaintiff, constitutes a defense. To hold otherwise puts the plaintiff at the mercy of the owner, who is presumptively hostile. This was not intended by the statute."

The appellee is proceeding in this action upon the contract right conferred upon her by statute.

Malmgren v. S. W. Ins. Co., 201 Cal. 29.

The rights of the injured person under the policy of insurance and the California Statute accrue at the time of the injury and the liability of the company to the injured person cannot be affected by any subsequent action taken as between the insurer and the insured.

Georgia Casualty Co. v. Boyd, 34 Fed. (2d) 116;

Finkelberg v. Continental Cas. Co., 126 Wash. 543, 219 Pac. 12;

Slavens v. Standard Acc. Ins. Co., 27 Fed. (2d) 859;

Metropolitan Cas. Ins. Co. v. Albritton, 214 Ky. 16, 282 S. W. 187;

Fentress v. Rutledge, 140 Va. 685, 125 S. E. 668.

In the case of *Marple v. Am. Auto Ins. Co.,* 82 Cal. App. 137, we find the California Court holding that under this statute an injured person may sue the insurer directly he obtains a judgment against the insured and that it is not a condition precedent to said action that the insured be insolvent or bankrupt. A holding which is clearly contra to the construction of the New York Statute under the authorities cited by appellant.

The Supreme Court of Washington in the absence of a statute, but under a similar state of facts as is caused by statute in California, and which in the particular case was brought about by provisions in the

policy, held in the case of *Finkelberg v. Continental Casualty Company, supra,* that a failure of the insured to perform a condition subsequent could not be raised by the insurer as a defense in an action on the policy brought by the injured party.

The State of Kentucky in the case of *Metropolitan Casualty Insurance Company v. Albritton,* 282 S. W. 187 took the same attitude and refused to allow the insurer to escape liability to the injured party by raising collateral matters.

To this contention the Court replied at page 188:

> "The excerpt above, taken from the policy, conferring a right of action upon the injured person against the company (defendant), in case of insolvency or bankruptcy of assured, was a stipulation for the exclusive benefit of such injured person, and it thereby created, under the policy, a dual obligation to the company in the event of the conditions named—one to the damaged person because of the accident growing out of either personal injuries or property lost, and the other to the assured—and those obligations when they arose under the policy, were totally independent of each other. Neither the assured by anything he might do could defeat plaintiff's cause of action under that clause, and likewise nothing they might do could defeat his right of action when it accrued by his paying the judgments against him."

These decisions are controlling even though there was an absence of statute in each of the jurisdictions referred to. The policies contained provisions which created the same obligations that would be created in California in insurance policies in the absence of said provisions.

That the presence or absence of a statute makes no difference in the rule is held in the case of *A. Rose & Son, Inc. v. Zurich General Accident and Liability Company,* 145 Atl. 813:

> "While automobile public liability insurance is of recent origin, we hold its beneficiary clause is no different in legal effect from that of the ordinary life insurance or mortgage insurance contract. It has been so held in other jurisdictions where the question has been presented, whether under a statute, or where no such statute exists. See Finkelberg v. Continental Casualty Co., 126 Wash. 543, 219 P. 12; Parker v. London Guarantee & Accident Co., U. S. Dist. Ct., E. D. Pa., March Term, 1926, No. 12218; Merchant's Mutual Ins. Co. v. Smart, 267 U. S. 126, 45 S. Ct. 320, 69 L. Ed. 538."

Appellant in its opening and supplemental briefs has collected a great mass of authority tending to establish its point that under the California Statute and the provisions of its policy the rights of the appellee are no greater than those of the insured and any defense that might be urged against the insured by the insurer may be urged against the appellee.

Foremost among the authorities cited by appellant are the New York authorities, which cannot be questioned and do support appellant's position but they do not determine nor can they determine the construction to be placed on the California Statute; nor can those authorities determine the construction that shall be given to the terms of the policy itself in this jurisdiction.

The California Courts are thoroughly familiar with the New York statute and the interpretation that has

been put thereon and has refused to follow blindly the path that has been blazed in the decisions of the New York Courts. The independent attitude of the California Courts and their belief that the California Statute is to be interpreted to apply to California conditions is denoted first in their expressions in the case of *Malmgren v. S. W. Insurance Company,* 201 Cal. 29, wherein it was urged upon the California Court that the California Statute was modeled after the New York Statute and so the same rules of construction should be applied. In answer the Court states at page 34:

> "Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796 (197 N. Y. Supp. 606), relied upon as an authority in the instant case, is merely declaratory of the New York statute, which provides that a cause of action does not accrue to the injured person until an execution issued upon the judgment against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. No such language or language equivalent thereto is found in the statute of this state and neither appellant nor this court is given authority to interpolate the provision of the New York law into a California statute."

It was also urged in the *Malmgren* case that there was no contractual relation between an injured person and the insurance company under policies written under the statute—the reply to this was:

> "The provisions of the statutes are, as a proposition of law, a part of every policy of indemnity issued by a company or corporation engaged in transacting the kind of indemnity insurance business which appellant was authorized by the law of the state to transact. It was a contractual

> relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy."

This language is important and is to be especially noted in consideration of the question whether or not the California Statute is to be construed in like manner as the New York decision. You can search the New York decisions thru and you will not find any authority to the effect that under their statute the relation between the injured party and the insurer is a contractual one.

In support of its contention the appellant cites *Pigg v. International Indemnity Company,* 86 Cal. App. 671. It is clearly not in point. We find nothing in the opinion stating that the statute saves to the insurer all defenses that it could urge against the insured. The point for which the case is cited was never presented to the California Court; it never arose, for there was an utter lack of proof of no cooperation, which was being urged as the defense, to the action.

The other California case of *Bryson v. International Indemnity Company,* 55 C. A. D. 87, certainly does not aid appellant's position. The only question decided there was that unless the policy covers the risk the insurer cannot be held by the injured person. An entirely different situation than the present where it is admitted that the policy covered the risk and was in full force and effect at the time of the accident and up to the 12th of May, 1927.

The appellant sees in the case of *Georgia Casualty Company v. Boyd, supra,* recently decided by this Court, the answer to this entire argument. It is true that we who represent the appellee, were also attorneys for the appellee in that matter, and we sincerely feel that we are better qualified than others to speak concerning the judgment in that matter.

This Court will recall that the case there presented was one *where the policy was void from the beginning,* the liability of the insurer to the insured had never attached and so your honors said:

> "Appellee's position would be tenable in the case of a valid contract of insurance, but it is quite incredible that the legislature, even were its power to be granted, intended to vest in a third person, who parted with no consideration, a right superior to that of the assured himself, or to give validity in favor of such third person to an instrument void as between the parties thereto. *It may be conceded that after an injury has been suffered, neither by agreement nor otherwise could the parties to the policy deprive the injured person of the benefit thereof, but as already suggested, the right of the third person presupposes the existence of a valid policy.* The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages. *In the one case, as well as the other, the defense of invalidity is open to the insured."*

Here, of course, we have no such situation, the policy was valid at all times and in full force and effect.

This case comes clearly within the line of the "conceded situations" in which the injured person is

entitled to recover. The decision in *Georgia Casualty Insurance Company v. Boyd,* rather than supporting the appellant's case in any particular is entirely for the position of appellee.

As we have stated, the New York decisions, followed by Ohio and certain other jurisdictions show that those jurisdictions do not consider that it was intended to deprive the insurance company of any defenses it might have under the policy. However, this view was not so clear to the New York Court as may be seen by a reference to the *Roth* case, 195 N. Y. S. 865, the case of first impression in New York. In that case five Justices sat, and there are three expressions of opinion; one Justice concurred in the result to make the majority opinion, and two of the Justices filed a dissenting opinion. The case is not the satisfactory authority for appellant's position that it claims, however, a subsequent decision by another Court of like jurisdiction did determine the matter so far as New York was concerned; this was the *Schoenfeld* case, 197 N. Y. S. 606, and in the opinion therein, the *Roth* case was referred to and it is said that the *Roth* case did not determine the questions as to the defenses which the insurance company might urge against the injured party. So we see that even in New York it was not the clear cut question appellant's counsel would have us believe; they hesitated there as to which course they would pursue. The authorities, we cite, show that other states have chosen the other construction and we have conclusively proved to this Court that California is indicating that it will follow the line of decisions which

hold that these statutes and provisions are for the benefit of the injured party and that the injured person is not to be deprived of the benefit of the insurance by any act *subsequent* to his injury between the assured and the insurer.

II.

THE APPELLEE IS, IRRESPECTIVE OF THE CONSTRUCTION OF THE STATUTE, AND A DECISION UPON WHICH IS NOT NECESSARY TO THE DETERMINATION OF THIS CAUSE, ENTITLED TO AN AFFIRMATION OF THE JUDGMENT.

Our authorities for this statement are the following cases:

Finkelberg v. Continental Casualty Company, 126 Wash. 543, 219 Pac. 12;

Metropolitan Casualty Insurance Co. v. Albritton, 214 Ky. 16, 282 S. W. 187;

Slavens v. Standard Acc. Insurance Company, 27 Fed. (2nd) 859.

At the outset, it must be admitted that all the terms and provisions in the policy are binding upon the parties thereto, except in so far as they may be inconsistent with special statutory requirements of the jurisdiction wherein the policy is written.

The situation here is not involved. The appellant issued its policy to Harris; he injured the appellee; Harris notified the appellant; told them all about the accident; the appellee sued Harris, who was served and Harris immediately sent the summons and complaint to appellant; the appellant employed Raines to defend Harris, made him their agent for them-

selves and Harris on account of the litigation growing out of the injury; thereafter Stafford, the attorney for the appellee wrote Raines the important letter of January 10, 1927, to-wit:

> "Mr. Joseph M. Raines January 10th, 1927.
> Attorney at Law
> Fairfield, California
> Dear Sir:
>
> I received a copy of your demurrer in the matter of Colthurst v. Harris.
>
> Subsequent to the commencement of the action in Solano County, I commenced an action in Napa County where the accident occurred and accordingly, I have dismissed the Solano action and enclose you a copy of the same.
>
> Very truly yours,
> Harry I. Stafford."

Raines received the letter and sat back, never notified Harris that the Solano County action had been dismissed and the same action commenced in Napa County. The appellant, of course, is charged with notice of this state of affairs for such knowledge was imparted to their agent Raines in the course of his duties for appellant. The appellant equalled Raines in laxness and the next step was the judgment against Harris on which this suit is based.

Harris was notified of the entry of the judgment in the Napa action by appellee; he informed the appellant, who thereupon wrote him that it denied liability under the policy on the ground that he had failed to forward it the papers in the Napa action, thus violating a condition of the policy and releasing appellant from its contract.

Appellee under the foregoing recital of facts, is certainly entitled to judgment. The merits of this case are decidedly in her favor, to the point of being one sided and the appellant is estopped to raise any defense against her.

The appellant knew everything about the accident that could possibly be known. It undertook the defense of Harris in the Solano County action and was fully informed as to the dismissal of that action and the commencement of the like action in the adjacent Napa County. The appellant's agent was negligent and lax and now the appellant is reduced in its ill-becoming desire to avoid its obligation, to the old situation of the pot calling the kettle black.

Appellant's position is clear—it says, "I didn't do my duty, but neither did Harris do his, so let the injured party suffer."

But Harris did do his duty, and more than that, the appellee through her attorney, gave them sufficient notice to charge them in this case.

Subdivision 1 of Paragraph B of the policy states:

> "Written notice of any accident with the most complete information obtainable at the time must be forwarded to the Home Office of the Company, or to an authorized representative as soon as is reasonably possible. Notice given by or on behalf of the Assured to any authorized agent of the Company with particulars sufficient to identify the Assured shall be deemed to be notice to the company and failure to give any notice hereinbefore required shall not invalidate any claim made by the Assured, unless it shall be shown not to have been reasonably possible to give such notice within prescribed time, and that notice

thereof, and if suits are brought to enforce such a claim, the Assured shall immediately forward to the Company every summons, or other process as soon as same shall have been served on him." (Tr. p. 70.)

We think that paragraph taken as a whole belies appellant's attitude in this matter. The appellant is relying on the very last clause in said subdivision, but it, of course, must be construed in the light of the whole division.

Appellee is of the opinion that the complete notice of the accident to appellant, the forwarding of the original Solano County suit, the notice by appellee to appellant of the commencement of the Napa County suit and the dismissal of the original action added to the appellant's failure of duty more than fulfills the requirements of the provision of the policy as to notice and if any damage has been suffered by appellant, the same is due to its own dereliction.

The cases we cite support this theory:

Slavens v. Standard Acc. Insurance Co. (*supra*), decided by this Court is without doubt the counterpart of this action. There the defendant company had issued an automobile indemnity policy to one, Ernst. The plaintiff was injured while one, Weinsheimer was operating Ernst's car with his permission. Ernst gave notice of the accident immediately to the company and of plaintiff's claim. Plaintiff sued Weinsheimer and served Ernst who turned the summons and complaint over to the insurance company. Plaintiff also notified the company of the action.

Practically all of the authority cited by appellant is merely cumulative of the one point that appellant should be allowed to assert any defense it has against its insured against the appellee and these decisions are not in point when we consider that the real question to be decided in this case is, did or did not the appellant have sufficient notice to charge it under its policy.

There is no doubt in our mind that it did and that *Slavens v. Stand. Acc. Insurance Company, supra,* completely supports that theory.

Of all appellant's authority there is only one case that has any appearance of bearing upon this question, but even it fades under a close scrutiny. That is the case of *Miller v. Metropolitan Casualty Ins. Company of New York,* 146 Atl. 412, where there was a failure to forward the summons and complaint. The case is clearly distinguishable upon its facts from the present case as well as the *Slavens* case. In the *Miller* case the insurance company had notice of the accident and no more; in the *Slavens* case it had notice of the accident, summons and complaint; and in this case the insurance company had notice of the accident, summons and complaint and notice from appellee.

We could find stronger language but none more applicable to the present case than appellant's own statement in regard to the *Slavens* case:

> "the fact was that the insurance company received all the notice to which it was entitled, and that its contention that the notice had not come from the proper person was hypertechnical and a mere quibble."

CONCLUSION.

The construction to be given the California Statute is to be governed by the intent manifested by the legislature in its enactment and the expressions of the California Courts in respect thereto. The New York authorities are not controlling, nor are they in point for although there is a similarity of language in the New York and California Statutes, they are fundamentally different in effect and outlook.

The California Statute creates a privity of contract between the injured person and the insurer; it does not require proof of the insolvency or bankruptcy of the insured and it does not require the return of an execution unsatisfied before suit can be maintained against the insurer. Any one of which differences call for an interpretation entirely opposed to the New York view.

We are convinced that under the California Statute the failure of the insured to perform conditions subsequent cannot be made a defense to an action brought on the policy by the injured party.

Regardless of the foregoing question, we submit that by reason of the facts in this case, a decision on the construction to be given the California Statute is unnecessary. That the situation presented merely requires a ruling as to the sufficiency of the notice given appellant and if, under the circumstances, it complied with the requirements of the policy and the law.

In our opinion, there was more than ample notice to appellant, for even though the insured may have failed to forward the summons and complaint in the

Napa County action, still appellant knew that the action had been commenced and was pending, and was fully informed of appellee's claims and charges through the forwarding of the complaint and summons in the Solano County action and the letter to its agent of January 10th, 1927, from the appellee.

We submit that the authorities of this jurisdiction fully support that opinion and that the judgment should be affirmed.

Dated, San Francisco,
November 23, 1929.

Respectfully submitted,
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